No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH-HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, Trustee,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Is the Montana Dangerous Drug Tax, as applied to the Kurths, who have been previously convicted and punished for dangerous drug violations, violative of the Double Jeopardy Clause's prohibition against multiple punishments for the same offense under the rationale of *United States v. Halper*, 490 U.S. 435 (1989).

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STATEMENT OF THE CASE

On October 18, 1987, the Kurth family was apprehended for growing marijuana on their Montana farm. (Trial Transcript [Tr. Trans.] p. 74; App. to Pet. for Cert. at 29, ¶ 14) A search of their farm uncovered marijuana plants, marijuana and marijuana derivatives.[1] (Plaintiffs' Exhibit [Pl. Exh.] 14; App. to Pet. for Cert. at 29-30, ¶ 15)

The Kurths were charged with various criminal offenses including criminal possession and sale of dangerous drugs and conspiracy to possess and sell dangerous drugs. (Pl. Exh. 1, 2, 4, 6, 8, 10, and 12; Tr. Trans. p. 74) Ultimately, the Kurths pled guilty to these charges. (Pl. Exh. 3, 7, 9, 11 & 13; Tr. Trans. pp. 74-75) The state trial court imposed various sentences ranging from twenty years in the Montana State Prison, with ten years suspended, for Richard Kurth, to deferred sentences for the others. (App. to Pet. for Cert. at 30-32, ¶ 17)

As the criminal proceedings made their way through state court, the State also prosecuted a civil forfeiture action which resulted in the confiscation of approximately $18,000 from the Kurths. (App. to Pet. for Cert. at 34, ¶ 25) The State deposited these funds in the drug forfeiture accounts of the law enforcement agencies

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[1] In an attempt to color the Court's perspective of this case, Montana takes substantial liberties with the underlying record. For example, Montana asserts that the "Kurths sold . . . about 5 to 10 pounds a week . . . at $1800 per pound." Brief for Montana at 3-4, 7 n.8. These statements are without support in the record. Montana cites Tr. Trans. 93 and Exhibit "DD" to support these assertions, but these statements do not appear there or elsewhere in the record.

involved in the criminal proceedings. (App. to Brief for Montana at 21, ¶ 1)

Then, a third proceeding was launched against the Kurths by the State, this time through Petitioner, Montana Department of Revenue (hereinafter referred to as "Montana" or "D.O.R."), which assessed a "tax" of more than $800,000 against the Kurths and began collection proceedings through the administrative process. (*See e.g.* Pl. Exh. 19, 23; App. to Pet. for Cert. at 33-35, ¶¶ 20-27) The basis for this "tax" is the "Dangerous Drug Tax Act," Montana Code Annotated ("MCA") §§ 15-25-101-123.[2]

Montana's "Dangerous Drug Tax Act" purports to establish "a tax on the possession and storage of dangerous drugs." MCA § 15-25-111(1). "[E]ach person possessing or storing dangerous drugs is liable for the tax" in an amount determined by the department. *Id.* This tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112. The burden of proving lawful possession of the dangerous drug is on the "taxpayer." *Id.* Liability for the tax does not arise until the "taxpayer" is arrested. Administrative Rule of Montana ("A.R.M.") 42.34.102(1)

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[2] Yet a fourth prosecution for unlawful possession of marijuana, among other charges, was attempted by the Federal Government against Richard Kurth. *United States v. Kurth and Michunovich*, No. CR-89-006-GF (Dist. Mont. 1989). (Tr. Trans. at 75) The federal district court ultimately dismissed this case because it found the conduct of the United States, as it concerned the prosecution of Richard Kurth, "selective or vindictive . . . " and thus in violation of due process of law. *Id.* Memorandum Opinion, dated April 21, 1989 at 6-7; *see also* Tr. Trans. at 75.

(The drug tax administrative rules are set forth in the Appendix to this Brief).[3] At that time, the police officer responsible for the "taxpayer's" arrest completes the tax return and gives the arrested "taxpayer" an opportunity to sign it. MCA § 15-25-113(1); A.R.M. 42.34.102(3). If the "taxpayer" refuses to sign the return, the arresting officer must "certify and submit the form to the department within 72 hours of the arrest." *Id.*[4]

In September 1988, the Kurths filed a Chapter 11 bankruptcy petition automatically staying the administrative proceedings before the D.O.R. pursuant to 11 U.S.C. § 362(a). Montana filed several proofs of claim with the

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[3] The Department calculates the "tax" pursuant to the provisions of MCA § 15-25-111(2), which provides in relevant part:

* * *

> (2) [t]he tax on possession and storage of dangerous drugs is the greater of:
>
> (a) ten percent of the assessed market value of the drugs as determined by the department; or
>
> (b) (i) $100.00 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;
>
> (ii) $250.00 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized. . . .

MCA § 15-25-111(2).

[4] The dangerous drug tax return, filed by the arresting officer, includes the "taxpayer's" "name, address, social security number, arrest or booking number and the type and quantity of the dangerous drugs possessed or stored." A.R.M. 42.34.102(5). (*See e.g.* Pl. Exh. 15)

Bankruptcy Court. The ultimate amended proof of claim was for $864,940.99, consisting of $684,914.30 in principal, $113,134.44 in penalties and $66,914.30 in interest. (App. to Pet. for Cert. at 35, ¶ 27)

The Kurths filed an adversary proceeding challenging Montana's Amended Proof of Claim and the constitutionality of Montana's Dangerous Drug Tax Act. (District Court Record "R" 7) Following a two-day trial, the bankruptcy court determined that Montana's tax on the marijuana plants and derivatives was arbitrary and capricious and therefore illegal. *In Re Kurth Ranch*, 122 Bankr. 759 (Bankr. D. Mont. 1990). (App. to Pet. for Cert. at 43-46, 60) The court concluded that Montana's assessment on the remaining marijuana satisfied the requirements of the Act but, as applied to the Kurths, ran afoul of the Double Jeopardy Clause as interpreted in *United States v. Halper*, 490 U.S. 435 (1989). (App. to Pet. for Cert. at 51, 58-59)

On appeal the district court affirmed the bankruptcy court. *In Re Kurth Ranch*, No. CV-90-084-GF (D.Mont. Apr. 23, 1991) (App. to Pet. for Cert. at 22) It found that "[a]s applied to the factual situation presented, the Montana Dangerous Drug Tax Act simply punishes the Kurths a second time for the same criminal conduct." (*Id.*)

On appeal to the Ninth Circuit, Montana abandoned its challenge regarding the arbitrary valuation of the plants and appealed only the district court's affirmance of the bankruptcy court's determination that the $208,150 tax on the harvested marijuana violated the Double Jeopardy Clause. (App. to Pet. for Cert. at 6) Applying *Halper*, the Ninth Circuit affirmed the lower courts' holding that "[t]he tax assessment levied by Revenue in this case constitutes an impermissible second punishment in violation

of the federal Constitution's Double Jeopardy Clause." *In Re Kurth Ranch*, 986 F.2d 1308, 1311-12 (9th Cir. 1993). (App. to Pet. for Cert. at 10-12)[5]

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[5] Montana and the Solicitor General, admitting that the argument was not raised below, *see Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (Supreme Court declined to consider argument not presented to Court of Appeals) argue that double jeopardy does not apply to five members of the Kurth family because they pled guilty in state court to conspiracy to possess dangerous drugs. *United States v. Felix*, 112 S.Ct. 1377 (1992). This argument ignores the context of the guilty pleas before the state trial court. All members of the family were charged with criminal possession of dangerous drugs and conspiracy to commit the offense of criminal possession of dangerous drugs. (Pl. Exh. 3, 7, 9, 11 & 13) All members of the family initially entered "not guilty" pleas to these charges. (*Id.*) This plea was later withdrawn and a plea of guilty, for five of the six family members, was entered concerning the conspiracy charge. (*Id.*) At that time, the County Attorney moved to dismiss the remaining charge of criminal possession of dangerous drugs and that motion was granted. (*Id.*) Clearly, the State could not, after dismissing the second charge, recharge the individual defendant. Such conduct by the state would constitute a violation of due process, *see, e.g., Mabry v. Johnson*, 467 U.S. 504, 507 (1984) (Once a plea agreement is embodied in the judgment of a court the ensuing guilty plea implicates the Constitution), and in the context of the entire criminal process constitute a double jeopardy violation, incorporated into the Due Process Clause of the Constitution.

It follows that where the charges were merged and a plea agreement made, which disposed of all charges, both due process and double jeopardy preclude a subsequent punishment based on the earlier charge disposed of by plea agreement. *Cf. Sealfon v. United States*, 332 U.S. 575 (1948) (acquittal of conspiracy charge barred subsequent prosecution for substantive offense under principle of *res judicata*).

Following Montana's reasoning to its logical conclusion, it should be noted that, at the drug tax trial, the only evidence

SUMMARY OF ARGUMENT

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435 (1989). In *Halper*, this Court held that a civil sanction may be punitive under certain circumstances and thus within the scope of the Constitution's double jeopardy prohibition. The Court in *Halper* adopted the following test: "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment. . . . " 490 U.S. at 448. Last term, this Court reaffirmed *Halper* in *Austin v. United States*, 113 S.Ct. 2801 (1993).

Montana and the Solicitor General try to distinguish *Halper* because *Halper* did not involve a tax and courts are traditionally deferential to taxes. The flaw in this argument is recognized by the Solicitor General who acknowledges "that it is conceivable that a legislature could attempt to impose a criminal-type penalty under the label of a tax." Brief of Solicitor General at 20. Exactly. The Double Jeopardy Clause could be easily evaded if a second punishment were imposed under the guise of a tax. Thus, taxes imposed after criminal convictions, on the same offense, must be closely examined.

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offered by Montana to support the imposition of the tax were the documents of conviction and sentencing. (Tr. Trans. at 2, 86-115, 246-270) Accordingly, its drug tax assessment against five of the Kurths should fail for simple want of proof. Montana plainly failed to prove possession of marijuana. All it proved was a plea to "an agreement" to possess (i.e conspiracy).

The proper approach to considering this question was outlined in *United States v. LaFranca*, 282 U.S. 568 (1931) – a case which addressed the double jeopardy issue but which disposed of the case on statutory grounds. There, defendant was convicted and punished in a criminal prosecution. The government then brought a civil action for double taxes and penalties based upon the same conduct. The Court concluded that the defendant could not have been prosecuted criminally for the same acts and the fact that the second proceeding was a civil action did not alter this rule. The Court also concluded that the label affixed to the second proceeding was not controlling and rejected the government's argument that the second measure was a civil tax rather than punishment under double jeopardy.

Montana and Amici also attempt to escape judicial review by arguing that taxes serve a dual function – and that this Court has abandoned efforts to distinguish between revenue raising and regulatory taxes. This argument fails to recognize, however, the difference between a tax that regulates and one which is in part punitive. The fact that the Court may be reluctant to review the purpose of a tax for regulatory features, has little to do with whether a tax is punishment under double jeopardy. Many courts, including this Court, have recognized that such taxes serve "to punish and deter those in possession of illegal drugs." *Sims v. State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992). *See also Leary v. United States*, 395 U.S. 6 (1969).

This Court rejected a similar argument to Montana's in *Marchetti v. United States*, 390 U.S. 39 (1968), where the Court made it clear that it will rigorously review those

features of a tax which impinge on constitutional rights: "the constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." 390 U.S. at 58. While *Marchetti* arose in the context of the Self-Incrimination Clause, the Double Jeopardy Clause commands the same careful scrutiny.

Montana and Amici further seek to distinguish *Halper* and *Austin* by arguing that taxes are designed simply to raise revenue. This argument is not persuasive in light of the concession that punitive measures may be adopted under the guise of a tax. In any event, Montana's drug tax is not a general revenue tax. Even if it were, this Court often reviews many types of state tax measures for constitutional compliance. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Montana's argument, if adopted by this Court, recognizes no limit to the punitive sanction Montana may impose under the "tax" label in pursuit of a purported revenue raising purpose. This argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment.

Recognizing the weakness in its first argument for immunity from judicial review, the Solicitor General suggests a fall-back position – "two key principles" to assess whether a tax is based on a revenue-raising purpose. First, if the tax is imposed on both legal and illegal goods no further inquiry is warranted. The Solicitor General concedes that Montana's drug tax fails this test.

The second principle is whether the tax is of a type, and in an amount, that is ordinarily imposed on legal goods. The Solicitor General attempts to justify Montana's tax under this principle, but, in fact, Montana's tax fails. No other Montana tax is assessed on the basis of the "greater of" ten percent of the market value of the product, or a fixed amount, as determined by the aggregate weight. In addition, unlike other taxes, the drug tax applies only upon criminal apprehension. Finally, the resulting tax rate is plainly excessive.

Montana also argues that if this Court decides to review Montana's drug tax, it will immerse itself in a "quagmire." This Court appreciates the difficulties in tax review but has never shirked from its responsibilities under the Constitution. Drug taxes are therefore subject to double jeopardy analysis.

Looking, as *Halper* commands, at the character of the actual sanctions imposed on the individual by the machinery of the state, the retributive effect of Montana's drug tax is clear. Liability for the tax is tied directly to the commission of a crime and conditioned upon the culpability of the taxpayer. The tax cannot be paid until the individual is arrested at which time the arresting officer prepares the drug tax return. Payment of drug taxes may also be included as part of a plea agreement between the taxpayer and the county attorney prosecuting the criminal case. In *Austin* this Court relied upon similar factors in concluding that *in rem* forfeitures of property are punitive in nature and therefore subject to review under the Excessive Fines Clause of the Eighth Amendment.

Montana's drug tax stands in contrast to the federal marijuana tax reviewed by this Court in *United States v. Sanchez*, 340 U.S. 42 (1950), because the federal tax was not conditioned upon the commission of a crime. If it had been, and had there been a criminal conviction and a double jeopardy defense raised, careful review of the drug tax would have been necessary.

If, as Montana and Amici argue, Montana's drug tax were solely for a revenue-raising purpose, it could have been carefully tailored to achieve that purpose without being necessarily linked to a criminal prosecution. Minnesota's drug tax, for example, provides for the anonymous purchase of tax stamps prior to and independent of any criminal prosecution for unlawful possession of dangerous drugs.

The deterrent purpose of Montana's drug tax is also evident in the excessive rate of the tax. The clearest evidence of this deterrent purpose is the State's valuation of 100 pounds of shake, less valuable marijuana, at a rate of eight times its market value. The Montana official responsible for assessing the tax in this case testified that despite his long tenure with D.O.R., he never administered any tax which is eight times greater than the market value of the product. For these and other reasons, the bankruptcy court properly determined that the Dangerous Drug Tax Act promotes the traditional aims of punishment – retribution and deterrence.

Montana argues that the drug tax is an excise tax administered like all other taxes. Not true. No other tax has the features discussed above. Moreover, if this argument were accepted, there would be no limit on the amount of taxes Montana could impose.

Finally, where as here, a defendant has previously sustained a criminal penalty and the civil sanction sought in the second proceeding appears punitive, the defendant is entitled to an accounting of the government's costs. Respondents recognize that such accounting cannot be absolutely precise. Montana, however, did not even make a passing attempt to justify the tax as proportional. Thus there is no evidence in the record upon which a remedial finding can be based.

Montana and Amici argue that an accounting is not required and that this Court may simply take judicial notice of the cost of drug abuse on society. This argument is inconsistent with the "intrinsically personal" protection of the Double Jeopardy Clause and the "particularized assessment" required by *Halper*. Moreover, this Court in *Austin* rejected an identical argument advanced by the United States. In sum, on the basis of the evidence before it, the courts below properly found that Montana's tax simply punishes the Kurths a second time for unlawful possession of marijuana.

ARGUMENT

I. CIVIL SANCTIONS, INCLUDING TAXES, MAY CONSTITUTE PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

A. INTRODUCTION – THE DOUBLE JEOPARDY CLAUSE FORBIDS MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The Double Jeopardy Clause of the Constitution protects against three separate abuses: (1) a second

prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989).[6]

The pivotal question in this case is whether the Montana Drug Tax, imposed on the Kurths after criminal conviction, is, in part, punitive, for if it is, it constitutes a second "punishment" for the same offense in violation of the Double Jeopardy Clause.

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[6] In *Halper* this Court observed that the protection against multiple punishments for the same offense "[h]as deep roots in our history and jurisprudence:

> As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. 163, 168 (1874).

490 U.S. at 440.

B. THE *HALPER* AND *AUSTIN* CASES ESTABLISH THAT CIVIL SANCTIONS AND CIVIL FORFEITURES MAY BE "PUNISHMENT" UNDER CERTAIN CIRCUMSTANCES.

Halper involved a double jeopardy challenge to a "civil" penalty imposed pursuant to the civil false claims act, 31 U.S.C. §§ 3729-3731, after conviction under the criminal false-claims statute, 18 U.S.C. § 287. The government argued that double jeopardy was not implicated because the second sanction was "civil" in nature. 490 U.S. at 441, 446-47. Rejecting that argument, this Court held that a sanction, although denominated "civil," may be punitive under certain circumstances, and thus within the scope of the Constitution's double jeopardy prohibition:

> *In making this assessment, the labels "criminal" and "civil" are not of paramount importance.* It is commonly understood that *civil proceedings may advance punitive as well as remedial goals*, and, conversely, that both punitive and remedial goals may be served by criminal penalties.

490 U.S. at 447 (emphasis added).[7]

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[7] The Solicitor General argues, in an attempt to distance tax measures from the civil penalty involved in *Halper*: "Tax statutes – unlike civil penalty provisions – do not come before a court accompanied by an express label indicating that a penalty was intended." Brief for Solicitor General at 19. Exactly. If the argument is accepted, a sophisticated legislature will avoid calling a punitive measure a "civil penalty" or "forfeiture," but will, instead, call it a tax. *Cf. Trop v. Dulles*, 356 U.S. 86, 94 (1958) ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!").

In the present case, the Ninth Circuit carefully followed the reasoning in *Halper* in holding that "[a]lthough the Montana statute labels the assessment as a 'tax,' this in itself is not dispositive as to whether the imposition constitutes an impermissible second punishment. A state cannot evade the prohibitions of the federal constitution merely by changing the label of the punishment." 986 F.2d at 1310. The Ninth Circuit cited the following language from *Halper*:

> Indeed, " 'labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.' " *Id.* 490 U.S. at 448 . . . (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 . . . (1988)).

986 F.2d at 1310-1311.

Last term, after the Ninth Circuit's decision in this case, this Court reaffirmed the *Halper* holding in *Austin v. United States*, 113 S.Ct. 2801 (1993). It followed *Halper* in deciding that a civil forfeiture pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 881(a)(4) and (a)(7), may constitute punishment and may therefore violate the Eighth Amendment's Excessive Fines Clause in certain circumstances. *Austin*, 113 S.Ct. at 2812.

C. UNDER *HALPER-AUSTIN*, A CIVIL SANCTION CONSTITUTES PUNISHMENT UNLESS SOLELY NON-PUNITIVE IN NATURE.

Given the holdings in *Halper* and *Austin*, the question then becomes how to assess the circumstances in which a

measure, although denominated as "civil," implicates double jeopardy because it constitutes punishment. In *Halper*, this Court held that the constitutional protection against double jeopardy is "intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." 490 U.S. at 447.

> To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. *Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.*

490 U.S. at 448 (emphasis added). *Halper* further stated that "retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.* at 448, *quoting Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).

From this analysis, the following test was applied:

> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment. . . .

Halper, 490 U.S. at 448 (emphasis added).

Both Montana and the Solicitor General have mischaracterized this standard. Referring to *Halper*, Montana states: "One of the tests used . . . is whether 'the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.' " Brief for Montana at 29-30 (emphasis in the original). This stands the test on its head. In fact, the test in *Halper*, as reiterated in *Austin*,

is that a civil proceeding can be characterized as imposing "punishment" if it cannot be *solely* explained as serving a compensatory or remedial purpose. *Halper*, 490 U.S. at 448 (emphasis added).

The Solicitor General is equally as licentious in his characterization, arguing:

> [w]hen analyzing a civil measure that has dual penal and non-penal purposes . . . [i]f the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

Brief for Solicitor General at 14-15. This is difficult to square with the Double Jeopardy Clause, which plainly forbids multiple punishments for the same offense. It is equally difficult to square with the holdings of *Halper* and *Austin*. This Court said in *Austin*: "Under *United States v. Halper*, 490 U.S. 435, 448 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." 113 S.Ct. at 2810 n.12 (emphasis in the original).

These misstatements of the *Halper* standard are particularly indefensible in light of *Austin's* unequivocal reaffirmation of *Halper* at least five separate times.[8] There

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[8] *See Austin*, 113 S.Ct. at 2806 ("We said in *Halper* that a 'civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term' "); *Id.* at 2810 n.12 (quoted above); 113 S.Ct. at 2812 (" '[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' *Halper*, 490 U.S., at 448") (emphasis in the original); *Id.* at 2806 ("We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish"); *Id.* at 2812 ("[W]e cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense . . . ' ") (footnote and citation omitted).

is a perfectly sound reason for *Halper*'s careful phrasing. The Double Jeopardy Clause forbids multiple punishments for the same offense. Thus, to the extent a civil sanction punishes, it runs afoul of the Double Jeopardy Clause. *Halper*, 490 U.S. at 448-49.

D. A MEASURE DENOMINATED AS A TAX MAY CONSTITUTE "PUNISHMENT" WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE.

Montana and Amici argue that *Halper* and *Austin* are not applicable because the Montana Drug Tax is not a "civil sanction," but rather a "tax." They argue for virtual immunity for taxes from judicial review, arguing that courts traditionally are deferential to tax measures. They further argue that the purpose of taxes is generally to raise revenue and that the "compensatory/remedial" *Halper* test is therefore inapposite. Indeed, the Solicitor General goes so far as to argue that for double jeopardy purposes, punishment is imposed "[o]nly if it is not,

despite its label, a tax at all. . . . " Brief for Solicitor General at 15. These arguments are addressed below.

1. Tax Measures Are Not Immune From Judicial Review.

The central flaw in the argument that taxes are virtually immune from judicial review is recognized by the Solicitor General, who states: "*We acknowledge that* it is conceivable that *a legislature could attempt to impose a criminal-type penalty under the label of a 'tax.'* " Brief for Solicitor General at 20 (emphasis added). Precisely. The multiple punishment proscription of the Double Jeopardy Clause could be easily evaded if a second punishment may be imposed under the guise of a "tax" and thereby escape judicial review. Accordingly, taxes imposed subsequent to criminal convictions must be closely examined.

The proper approach to considering this question was outlined in this Court's decision in *United States v. LaFranca*, 282 U.S. 568 (1931) – a case Montana and Amici ignore. In that case, the defendant was convicted and punished in a criminal prosecution (unlawful sales of intoxicating liquor under the National Prohibition Act). After the conviction and fine in the criminal prosecution, the government brought a civil action against LaFranca for double taxes and penalties based on the same unlawful acts that formed the basis of the criminal conviction. *Id.* at 569-70. The Court framed the issue as follows:

> Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

Id. at 573. The Court answered, no, concluding that the label affixed to the second proceeding was not controlling, citing *United States v. Chouteau*, 102 U.S. 603 (1880).

In rejecting the government's argument that the second measure was a civil tax rather than a punishment under double jeopardy, the Court said:

> A tax is an enforced contribution to provide for the support of government; a penalty as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by *Lipke v. Lederer*, 259 U.S. 557, 561, 562. . . .

282 U.S. at 572. The Court stopped short of finding a double jeopardy violation, avoiding the "grave" constitutional question that would arise if the defendant were punished a second time. It construed a statutory provision barring further "prosecution" of those convicted under the criminal statute as precluding the civil action. *Id.* at 572, 575. "[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and

the word 'prosecution' is not inapt to describe such an action." *Id.* at 575.

LaFranca followed the early case *United States v. Chouteau*, 102 U.S. 603 (1880) which involved a civil suit brought under a statute prohibiting the distillation of liquor without payment of taxes and making violators "liable to a penalty of double the tax imposed" in addition to possible fines and imprisonment. *Id.* at 605. In deciding whether a criminal prosecution and settlement barred a subsequent civil suit for the statutory penalty under the Double Jeopardy Clause, the Court said:

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still . . . a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.

102 U.S. at 611.[9]

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[9] This Court has reviewed other nominal tax measures to ascertain whether they are essentially punitive in other cases as well. *See Helwig v. United States*, 188 U.S. 605, 610 (1902) ("whether the statute defines it in terms as a punishment or penalty is not important. If the nature of the provision itself be of that character"); *O'Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *United States v. Constantine*, 296 U.S. 287, 294 (1935) ("If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name"). *Constantine* was distinguished in *United States v. Kahriger*, 345 U.S. 22 (1953), which, in turn, was overruled in part in *Marchetti v. United States*, 390 U.S. 39 (1968).

Montana and Amici attempt to escape judicial review by arguing that taxes frequently serve a "dual function": " '[e]very tax is in some measure regulatory' since 'it interposes an economic impediment to the activity taxed as compared with others not taxed.' *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)." Brief for Solicitor General at 16. They rely on dicta from a footnote in *Bob Jones University v. Simon*, 416 U.S. 725, 741-42 n.12 (1974), in arguing that this Court has abandoned its efforts to distinguish between revenue raising and regulatory taxes on the basis of the primary purpose of the enactment. *Id.*

Their flaw is in their failure to recognize the difference in a tax which may have a "regulatory" aspect and one which has a "punitive" aspect. The Double Jeopardy Clause does not speak to "regulatory" conduct, rather it forbids multiple *punishments* for the same offense. This distinction was recognized in *Sonzinsky*, which refused to strike down a tax with "regulatory" consequences: "Nor is the subject of the tax (federal license tax for firearms dealers) described or treated as criminal by the taxing statute. Compare *United States v. Constantine*, 296 U.S. 287." 300 U.S. at 513.[10] Thus, the fact that this Court may be reluctant to review the purpose of a tax for regulatory features has little to do with the question of whether a "tax" is "punishment" under double jeopardy.

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[10] Although not a tax case, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) this Court recognized the difference between regulatory and penal legislation: "The punitive nature of the sanction here is evident under the test traditionally applied to determine whether an Act of Congress is *penal or regulatory in character*. . . . " *Id.* at 168 (emphasis added).

Most of the "regulatory tax" cases have arisen in the context of constitutional challenges to the exercise of federal legislative power under Article I, § 8 of the United States Constitution. Professor Tribe acknowledges that almost any tax will have "an ancillary regulatory effect. . . . " L. Tribe, *American Constitutional Law*, 319 (2d ed. 1988). He states, however,

> [i]f Congress has authority independent of its taxing power to regulate the taxed subject, this regulatory effect is not constitutionally troublesome. In such cases, even if the tax is plainly regulatory in purpose and effect, it may be upheld under the necessary and proper clause as a means of regulating an activity properly the subject of congressional regulation.

Id.[11] In this context, as Professor Tribe states, a deferential judicial attitude is readily explained:

> [T]he Court's expansive modern interpretation of the commerce clause substantially reduces the likelihood that a tax, even if found to be regulatory, would be held to be beyond congressional power.

Id. at 320.[12]

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[11] For example, as Professor Tribe explains, in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), a federal tax on bank notes issued by state banks was upheld, even though the effect of the tax was to drive such notes out of circulation, since Congress had the power under Article I, § 8 to regulate currency through taxation as well as by other means. Tribe at 319.

[12] For example, the majority in *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969), responded to a dissenting argument that a narcotics tax was not a revenue tax by noting that there was

This is not true when a tax measure poses a double jeopardy threat. Neither Congress nor the states have any ancillary power, like the federal interstate commerce or state police powers, to punish twice for the same offense. The Fifth Amendment commands precisely the opposite.

A similar argument to Montana's was rejected by this Court in *Marchetti v. United States*, 390 U.S. 39 (1968). Prior to *Marchetti*, this Court had upheld a conviction for running a gambling operation without paying a federal excise tax on all wagers. *United States v. Kahriger*, 345 U.S. 22 (1953). Using an analysis similar to Montana's here, the *Kahriger* opinion acknowledged that the tax had a "regulatory effect," "[b]ut regardless of its regulatory effect, the tax produces revenue," and was therefore a valid tax. *Id.* at 28. *Kahriger* further upheld the registration requirements of the wagering tax, citing *Sonzinsky* for the proposition that the registration requirements are supportable " . . . as in aid of a revenue purpose." 345

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independent congressional power to achieve the tax's regulatory results under the commerce clause. Tribe at 320 n.13. When Congress repealed the federal marijuana tax in 1971, the Secretary of Treasury testified in support of the repealing legislation and made this very point:

> The bill under consideration represents a comprehensive system of controls over narcotics, marijuana and dangerous drugs. It would repeal the Title 26 taxes on narcotics and marijuana on the ground that *the Federal role in the control of dangerous substances can be satisfactorily founded on powers other than the taxing power*. The Treasury Department supports this view and advocates the passage of this legislation.

Hearings Before the Committee on Ways and Means, House of Representatives, 91st Cong. 2d Sess. 260 (1970) (emphasis added).

U.S. at 32. *Kahriger* was, however, reversed in part in *Marchetti* where this Court said:

> The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation. . . . The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment.

390 U.S. at 44 (emphasis in the original) (citation omitted). The Court held that the Self-Incrimination Clause was violated. *Id.* at 54.

Thus *Marchetti* made it clear that the Court will rigorously review those features of tax measures which impinge on constitutional rights: "The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. *But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers.*" 390 U.S. at 58 (emphasis added). *Cf. Leary v. United States*, 395 U.S. 6 (1969) (federal marijuana tax and self-incrimination clause); *Grosso v. United States*, 390 U.S. 62 (1968) (federal wagering and occupational taxes and self-incrimination clause); *Haynes v. United States*, 390 U.S. 85 (1968) (registration of firearm and self-incrimination); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (invalidating state poll tax).

The Fifth Amendment's Double Jeopardy Clause commands the same careful scrutiny that is required by its Self-Incrimination Clause. In recognizing the fundamental nature of the right against double jeopardy, this Court said in *Benton v. Maryland*, 395 U.S. 784 (1969):

> The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of autrefoits acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once of the same offence." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188 . . . (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it

is clearly "fundamental to the American scheme of justice."

395 U.S. at 795-96 (footnotes omitted).

Accordingly, the cases which support deferential judicial review of taxes that may be "regulatory" in nature have no application. Where, as here, fundamental constitutional liberties may be infringed under the guise of a tax, careful review is required.

2. Constitutional Review of Tax Measures for Violation of Double Jeopardy May Not be Defeated Simply Because Taxes May Have a Concomitant Revenue Purpose or Because Separation of Purposes is Difficult.

Montana and Amici further seek to distinguish *Halper* and *Austin* by arguing that a part of the *Halper* standard for determining whether a civil matter is punitive or not, i.e., whether it is solely "compensatory" in purpose, is not applicable to a tax measure. They argue that, with the relatively "rare" exception of user taxes, taxes are generally to raise revenue. Brief for Solicitor General at 13. This argument is not persuasive in light of the concession that punitive measures may be adopted under the guise of a tax.

In any event, Montana's dangerous drug tax is not a "general-revenue" tax. It purports to dedicate the revenues derived from the tax for specific drug-related purposes.[13] Indeed Montana makes this very point in

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[13] *See* MCA § 15-25-122 (one-half of the proceeds to be used for youth evaluation program and chemical abuse after-care programs. The other half is allocated to a special law enforcement assistance account and the Department of Justice for grants to youth courts and to fund chemical abuse assessments and detention of juvenile offenders and facilities separate from adult jails.)

attempting a facial justification of the drug tax as "remedial."

Moreover, this Court is often impelled to review many types of state tax measures for constitutional compliance. Taxes are quite often viewed as "compensatory" in nature, contrary to the argument of the Solicitor General. For example, in assessing a state tax which may impact on interstate commerce, Professor Tribe states:

> The Supreme Court has recognized that the states have a legitimate interest in compensatory taxation of interstate commerce: 'It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business *even interstate business must pay its way.' Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

Tribe at 445 (emphasis added).[14]

The general test applied by this Court over a range of state taxes was set forth in *Complete Auto Transit, Inc. v.*

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[14] In addition to user fee taxes, a variety of state taxes have been reviewed for Commerce Clause, Due Process and Privileges and Immunities compliance. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) (manufacturing tax); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (flat fee tax); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) and *Austin v. New Hampshire*, 420 U.S. 656 (1975) (income taxes reviewed on privileges and immunities grounds).

Brady, 430 U.S. 274 (1977). Under *Complete Auto Transit*, a state tax will be reviewed for discriminatory effect under a four-part test, including whether the tax is fairly apportioned and whether the tax is "fairly related to the services or benefits provided by the state." *Id.* at 279.[15] Under this test, a generalized state argument that such state tax is immune from review because it is a general revenue-raising device, will not suffice.[16] The argument will not suffice for the same reason as here – if Court review were denied, discrimination against interstate commerce through state taxes would go unchecked.

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[15] Professor Tribe has commented:

> In general, claims of discriminatory taxation are judged primarily on the basis of the facial characteristics of the taxing statutes; the only economic conclusions reached are those which plainly derive from the structure of the industry taxed. But *Complete Auto Transit* may presage increased judicial willingness to examine specific factual circumstances.

Tribe, at 457.

[16] Montana cites *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) for the proposition that the amount of general revenue taxes collected from a particular activity need not be reasonably related to the value of the services provided to the activity. The general applicability of the language is questionable, particularly in light of the Court's holding in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). *Commonwealth Edison*, as the Ninth Circuit noted, concerned a tax imposed apart from a criminal conviction and therefore there was no need to assess whether its nature was punitive. 986 F.2d at 1311. While *Commonwealth Edison* involved an interstate commerce clause challenge, the tax was found not to be discriminatory because the rate of tax fell equally on coal bound for in-state consumers as well as out of state consumers (although 90% of the coal was bound for out of state). 453 U.S. at 617-18.

This Court has stated:

> The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral "guise of taxation which produces the excluding or discriminatory effect." *Nippert v. Richmond*, 327 U.S., at 426.

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. at 266, 296 (1987). Moreover, Montana's argument, if accepted by the Court, recognizes no limit to the punitive sanction Montana, or any other government, may impose under the "tax" label in pursuit of a purported remedial purpose. In other words, there is nothing in this argument suggesting that a line be drawn at $100 per ounce, $200 per ounce, $1,000 per ounce, or $10,000 per ounce of dangerous drugs. With each increase in the fine, Montana could assert that the legislature's intent, by increasing the fine, was to raise more general revenue for the operation of government. Such an argument is inconsistent with the Double Jeopardy Clause's proscription of multiple punishment.

Recognizing, as he must, that the Double Jeopardy Clause requires judicial review of tax measures because a measure under the guise of a tax could be punitive, the Solicitor General has a fall-back position. He suggests "two key principles" to assess whether a tax is based on a revenue-raising purpose. Brief for Solicitor General at 7-8. First, if the tax is of "general applicability" (i.e. imposed on both legal and illegal goods), no further inquiry into the punitive nature is warranted. The Solicitor General concedes that the Montana Drug Tax fails this test. Brief for Solicitor General at 7. Therefore he suggests proceeding to a "second" principle – "whether the tax is

of type, and in an amount, that is ordinarily also imposed on legal goods and activities." *Id.*

The Solicitor General then struggles mightily to justify the Montana tax under the second principle, arguing (without any record) based on various fixed-rate taxes. He cites, for example, a proposed cigarette tax increase to 99 cents per pack, a "fixed tax on vaccines ranging from 6 cents to $4.56 per dose," and a "fixed tax on ozone depleting chemicals." *Id.* at 23-24. No pricing information is offered, nor is there expert testimony on elasticity of demand or the relative ability of the applicable goods to absorb such taxes. In short, there is nothing of the "particularized assessment" required by *Halper*.

In fact, as demonstrated in Section II, below, Montana's tax would fail the suggested "second principle." Its feature which requires a tax the "greater of" 10 percent of the assessed market value of the drug, or up to $250 per ounce, as determined by the "aggregate weight" of the substance seized, is unlike any other Montana tax. Also, unlike other taxes, its application and administration is triggered by criminal apprehension. And its resulting rate is plainly excessive. In short, even under the principles suggested by the Solicitor General, the Montana drug tax fails.

Finally, Montana argues that, if this Court decides to review the Montana drug tax for punitive features, it will immerse itself in a "quagmire." Brief for Montana at 32. This Court fully appreciates the difficulties in tax review but it has never shirked from its responsibilities under the Constitution:

> Again we are "asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art I, § 8, of the Federal Constitution." *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 496 . . . (1947). [O]ur task is by no means easy; the uneven course of decisions in this field reflects the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity.
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> * * * *
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> Although we have described our own decisions in this area as a "quagmire" of judicial responses to specific tax measures, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 . . . (1959), we have steadfastly adhered to the central tenet that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 . . . (1977).

Scheiner, 483 U.S. at 268-69, 280. No one ever said that it is an easy process to ensure that government runs in accordance with the Constitution. Both *Halper* and *Austin* recognize the difficulties in assessing civil penalties and civil forfeiture for punitive features. Despite these difficulties, this Court in *Scheiner* and numerous other cases, has engaged in careful review of tax measures for compliance with the Constitution. This careful review is required by the Double Jeopardy Clause. The fact that "bright-line" distinctions are elusive in this area does not warrant casting the Fifth Amendment to the winds.

II. MONTANA'S DANGEROUS DRUG TAX, AS APPLIED TO THE KURTHS, VIOLATES THE DOUBLE JEOPARDY CLAUSE BECAUSE IT AMOUNTS TO A SECOND PUNISHMENT.

A fair analysis of Montana's dangerous drug tax demonstrates that deterrence and retribution are important purposes of the Act.

Before turning to Montana's drug tax, however, it is noteworthy that many courts, including this one, have recognized that drug taxes serve "to punish and deter those in possession of illegal drugs." *Sims v. State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992). *See Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 531 (Ill. 1992) ("the tax imposed by the Act tends to punish or deter those who possess or sell illegal drugs"); *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993) ("Obviously one purpose of the [drug] tax and penalty is to deter the sale of controlled substances. . . . "); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986) ("the clear intent of [South Dakota's tax on controlled substances and marijuana] is to provide an extra penalty on possessors of controlled substances"); *State v. Berberich*, 811 P.2d 1192, 1200 (Kan. 1991) ("[t]he minutes of the Kansas House and Senate committees show that the primary purpose of the [drug tax] Act was to combat drug usage . . . "); *State v. Durrant*, 769 P.2d 1174, 1181 (Kan. 1989) ("[T]he state concedes in its brief that the primary purpose of the [Kansas drug tax act] is to discourage or eliminate drug dealing"); *Sims v. State Tax Comm'n*, 841 P.2d 6, 15 (Utah 1992) (Stewart, J. concurring in the result) ("the primary purpose of [the] Act is to penalize, not to raise revenue. In effect, the Act imposes criminal penalties for the possession of illegal drugs");

Leary v. United States, 395 U.S. 6, 27 (1969) ("We think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marihuana laws"); *United States v. Sanchez*, 340 U.S. 42, 43 (1950) (objectives of federal Marijuana Tax Act were, in part to "render extremely difficult the acquisition of marijuana . . . and develop[ ] . . . adequate means of publicizing dealings in marijuana in order to tax and control the traffic effectively"); *Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) ("We think it quite plain that this [Marijuana Tax Act] is a penal and not a revenue-raising statute").[17]

Similarly, scholars recognize the punitive intent of drug tax statutes. *See, e.g.*, Seidman, *Taxing Controlled Substances*, 6 Journal of State Taxation 257, 257 (Fall 1987) ("This tax [on illegally held drugs] will serve as a deterrent to illegal transfers and use"); *see also* Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 51-52 (in press) 46 U. of Okla. L. Rev. No. 4 (Winter 1993).

A. A FUNCTIONAL ANALYSIS OF MONTANA'S DRUG TAX SHOWS IT TO BE PUNITIVE.

Looking, as *Halper* commands, at the "character of the actual sanctions imposed on the individual by the machinery of the state," 490 U.S. at 447, the retributive effect of Montana's drug tax is evident in several ways.

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[17] Montana incorrectly argues that *Tovar* was overruled by *United States v. Sanchez*, 340 U.S. 42 (1950). *See* Brief of Montana, pp. 20-21. In fact, *Tovar* was cited with approval in *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

First, unlike other taxes, liability for Montana's drug tax is tied directly to the commission of a crime and is conditioned upon the culpability of the "taxpayer." *See* MCA § 15-25-112; A.R.M. 42.34.102(1).[18] This tax does not apply to any person "authorized by state or federal law to possess or store dangerous drugs." MCA § 15-25-112. Moreover, liability for the drug "tax" does not arise – and cannot be paid – until the individual is arrested. *See* A.R.M. 42.34.102(1). At that time, the arresting officer prepares the drug tax return for filing with the state. *Id.* If the arrested "taxpayer" refuses to sign the return, the arresting officer must "certify and submit the form to the department within 72 hours of the arrest." *Id.* Finally, payment of drug taxes may be included "as an integral and contingent portion of any plea agreement" between the "taxpayer" and the county attorney responsible for the criminal prosecution of the "taxpayer." A.R.M. § 42.34.109(1)(d). In fact, at the drug tax trial, the only evidence offered by Montana to support the imposition of the tax were the documents of conviction and sentencing. (Tr. Trans. 2, 86-115, 246-270)

In *Austin* this Court relied upon similar factors in concluding that *in rem* forfeitures of property under the Comprehensive Drug Abuse Prevention and Control Act of 1970 are punitive in nature and, for that reason, subject to the Excessive Fines Clause of the Eighth Amendment. 113 S.Ct. at 2811-2812. The Court noted that forfeiture is

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[18] The liquor "tax" found barred in *United States v. LaFranca*, 282 U.S. 568 (1931) was similar to the Montana dangerous drug tax in that no provision was made for payment of that tax independent of criminal prosecution. 282 U.S. at 571.

tied "directly to the commission of drug offenses," and focuses on the "culpability of the owner" thereby revealing a legislative intent to punish those involved in illegal drug activity. *Id.*

Montana's drug tax statute stands in contrast to the former federal marijuana tax reviewed by this Court in *Sanchez*, because, as noted in *Sanchez*,

> *[t]he tax levied by [26 U.S.C.] § 2590(a)(2) is not conditioned upon the commission of a crime.* The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. *[S]ince his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil* rather than a criminal *sanction.*

340 U.S. at 45 (emphasis added). Thus, had the tax in *Sanchez* been conditioned upon the commission of a crime, had there been a previous criminal conviction, and had a double jeopardy defense been raised, careful review of the drug tax would have been necessary. *See Halper*, 490 U.S. at 447-49.

If, as Montana and Amici argue, Montana's dangerous drug tax were solely for the purpose of raising revenue, it could have been carefully tailored to achieve the purpose of raising revenue without being necessarily linked to a criminal prosecution. For example, the Minnesota dangerous drug tax, Minn. Stat. §§ 297D.01 *et seq.*, provides for the anonymous purchase of tax stamps prior to, and independent of, any criminal prosecution for unlawful possession of dangerous drugs. *See* Minn. Stat. §§ 297D.11 (Payment Due on Possession); 297D.13 (Confidential Nature of Information). In contrast, as explained, it is not possible to pay Montana's drug tax until the

individual is arrested. A.R.M. 42.34.102(1). At that time, the tax and attendant penalties and interest become immediately due and payable, and the burden of proof concerning the legality of possession of the illegal substance shifts from the state to the individual. MCA §§ 15-25-111(1); 15-25-112.

Montana's deterrent purpose is also evident in the excessive rate of the tax. By imposing a substantial tax and penalty for unlawful possession of dangerous drugs, the legislature intends to discourage or deter those in possession of illegal drugs.[19] The clearest evidence of the deterrent purpose of Montana's Drug Tax Act, as noted by the Bankruptcy Judge, is Montana's valuation of the 100 pounds of "shake."[20] (App. to Pet. for Cert. at 49-50, 59; *see also* Pl. Exh. 17 ("Item # 9") and 18)

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[19] *Cf.* K. Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale Law Journal 1795, 1816 n.68 (1992):

> In several early cases the Court took a functional view of monetary sanctions. *See United States v. Constantine*, 296 U.S. 287 (1935) (holding that excise tax grossly disproportionate to normal tax for retail liquor dealers who violate state law constitutes penalty); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (holding that "tax" that "clearly involves the idea of punishment for infraction of the law" is penalty); *Helwig v. United States*, 188 U.S. 605 (1903) (holding additional duty imposed for undervalued customs declaration that is greatly in excess of regular duty penal in character).

[20] "Shake" is the street term for the loose parts of the marijuana plants, particularly the stems and leaves, which are of significantly less value than the buds because of their lower THC content. (App. to Pet. for Cert. at 36)

Montana placed a market value for the shake at $200.00 a pound, based on valuations provided by the Federal Drug Enforcement Administration. (App. to Pet. for Cert. at 50; Pl. Exh. 17 and 18; Tr. Trans. at 58-61, 131-132, 140) Yet Montana taxed the shake at $100.00 per ounce ($1,600 per pound), thus taxing the product at eight times its market value. (*Id.*) This rate of taxation is clearly confiscatory, and intended to be: its obvious purpose is to wipe out illegal drug traffic. (*Cf.* Tr. Trans. at 61-64)

Mr. McGee, the Montana official responsible for the assessments in this case, testified that in his long tenure with D.O.R. he had never administered any tax which is eight times greater than the market value of the product:

> Q. [Y]ou've been in taxes in the Department of Revenue for how many years, Mr. McGee?
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> A. (McGee) Twenty years.
>
> Q. You've worked with what kinds of areas and what kinds of taxes?
>
> A. All kinds.
>
> • • •
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> Q. *You've never encountered in any other area of Montana taxation a tax which is eight times greater than the market value of the product taxed, have you?*
>
> A. *No.*

(Tr. Trans. at 61) (emphasis added) McGee also conceded that a farmer, taxed at that confiscatory rate, would not stay in business very long:[21]

> Q. The effect of that tax really is to discourage the kind of activity, that is, marijuana growing, that we're talking about in this case.
>
> A. I don't know what the effect – what the intent of the law was because I was not in any of the legislature hearings. *I know that that probably has the effect*, but whether that was the intent of the legislature or not, I don't know.

(Tr. Trans. at 64) (emphasis added)

The bankruptcy court properly determined that the dangerous drug tax act promotes the traditional aims of punishment – retribution and deterrence – because:

> [1] the tax applies to behavior which is already a crime, [2] the tax allows for sanctions by restraint of Debtors' property, [3] the tax requires a finding of illegal possession of dangerous drugs and therefore requires a finding of *scienter*, [4] the tax will promote elimination of illegal drug possession, and [5] the tax appears excessive in relation to the alternate purpose

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[21] Mr. McGee also testified:

> Q. In fact it would be the case, wouldn't it, that if you had a farmer out there growing a product and every year when the product came to harvest he was taxed eight times the market value of that product, that farmer wouldn't stay in business very long, would he?
>
> A. (McGee) I don't imagine he would.

(Tr. Trans. at 61-62)

> assigned, especially in the absence of any record developed by the State as to societal costs. Finally, [6] the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report. *All these aspects of the Drug Tax Act lead to the inescapable conclusion that it has deterrence and punishment as its purpose.*

(App. to Pet. for Cert. 59 (emphasis added))

Montana argues that "the Montana Tax is a straightforward excise tax[,]" Brief for Montana at 26, and "is administered like other Montana taxes." *Id.* at 16. Not so. No other Montana tax provides for a tax rate that is the "greater of" a fixed amount, as determined by the legislature, or 10% of the market value of the property, as determined by the department of revenue. *See e.g.*, MCA §§ 16-11-111, *et seq.* (taxation of tobacco); 16-1-401, *et seq.* (taxation of liquor); 15-6-133-134 (agricultural taxation). Thus it can hardly be classified as a typical "excise tax." Moreover, if this argument were accepted there would be no limit on the amount of taxes Montana could impose – it could raise the marijuana tax to $1,000 per ounce or $10,000 per ounce and still not be punitive.

Montana also argues that the Court sustained a $100 per ounce tax in *United States v. Sanchez*, 340 U.S. 42 (1950). *Sanchez* did not involve a double jeopardy issue. If it had, application of the tax would have failed because this Court had no trouble determining that the federal Marijuana Tax Act involved there was in part penal in nature; noting the two objectives of Congress; the first to raise revenue

> and, at the same time render extremely difficult the acquisition of marijuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marijuana in order to tax and control the traffic effectively. S. Rep. No. 900, 75th Cong. 1st Sess. p. 3. . . .

340 U.S. at 43.

Montana cites the rather spartan legislative history in support of its argument that the Montana drug tax is a bona fide tax.[22] A similar argument was made by the government in *Halper*, where it argued that the nature of a sanction is a matter of statutory construction, and statutory construction is determined by legislative intent. 490 U.S. at 447. The *Halper* opinion stated that "this abstract approach" has been followed when determining whether certain procedural protections should apply to a nominally civil proceeding (*see United States v. Ward*, 448 U.S. 242, 248-51 (1980)).

> But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, *the approach is not well suited to the context of*

[22] Montana failed, however, to provide the Court with the entire legislative history as an appendix to its brief. Montana did not include "Exhibit 4" referred to by several legislators. This exhibit included an article from the *Wall Street Journal* discussing the Minnesota drug tax statute and states in part: "Buyers are guaranteed anonymity as a constitutional safeguard, but *enforcers see the tax as a tool for squeezing pushers.*" *Id.*, Dec. 10, 1986 at 1 (emphasis added).

> *the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.* This constitutional protection is intrinsically personal. *Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.*

Halper, 490 U.S. at 447 (emphasis added) (citation omitted).[23]

In short, the unique factors of the Drug Tax Act make it clear that Montana's drug tax does not solely serve a compensatory or remedial goal. Montana's drug tax is punitive and its imposition in this case violates the Double Jeopardy Clause.[24]

[23] This is not to say that legislative intent should be ignored when it clearly establishes the penal nature of a measure. For example, in *Leary v. United States*, 395 U.S. 6 (1969), this Court reviewed both the mechanics and legislative history of the Marijuana Tax Act in determining that the Act violated the Fifth Amendment prohibition against self-incrimination. *Id.* at 22-27. In concluding that the Marijuana Tax Act "was aimed at bringing to light transgressions of the marihuana laws," 395 U.S. at 27, the Court relied upon testimony from the Treasury Department's General Counsel that purposes of the Act were to "discourage the current and widespread use of the drug by smokers and drug addicts," "to render extremely difficult the acquisition of marijuana for illicit uses," "to prevent transfers to persons who use marijuana for undesirable purposes," and "through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses." 395 U.S. at 22-23 (footnotes omitted).

[24] Montana relies in part on the Montana Supreme Court's rejection of a double jeopardy challenge to the Montana Drug Tax in *Sorensen v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992). The Ninth Circuit correctly rejected *Sorensen* because it "ignores

B. MONTANA FAILED TO JUSTIFY ITS DRUG TAX WITH ANY KIND OF PARTICULARIZED ASSESSMENT, OR ACCOUNTING, AS REQUIRED BY *HALPER*.

Where, as here, a defendant has previously sustained a criminal penalty and the civil sanction sought in the second proceeding appears punitive, the defendant is entitled to an accounting of the government's damages and costs. *Halper*, 490 U.S. at 449. Respondents recognize that such accounting cannot be absolutely precise. *Halper* appreciates the difficulty, instructing that "the process of affixing a sanction that compensates the Government for all of its costs inevitably involves an element of rough justice." 490 U.S. at 449. Montana, however, did not even make a passing attempt to justify the tax as proportional.

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the particularized double jeopardy inquiry required by *Halper*." 986 F.2d at 1312 n.2. Apart from that fundamental flaw, *Sorensen* applied the wrong legal analysis when it relied upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980):

> The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. *See Mendoza-Martinez*, 372 U.S. at 167, 184 . . . ; *Ward*, 448 U.S. at 248. . . . In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez*, and *Ward*. *See, e.g., United States v. Halper*, 490 U.S. 435, 447 . . . (1989).

Austin, 113 S.Ct. at 2806 n.6; *cf. Sorensen*, 836 P.2d at 31-32. Accordingly, the *Sorensen* opinion offers little guidance to this Court in assessing whether the Montana Drug Tax is punitive under the Double Jeopardy Clause.

Thus, as the courts below found, there is no evidence in the record on which a remedial finding can be based.[25]

Montana and Amici argue that such an accounting is not required because the second sanction is a "tax" devoted to the remedial goal of compensating the government for the costs of drug abuse in society. To this end, Montana and the Solicitor General argue that this Court

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[25] This failure of proof is not excusable. The bankruptcy court rejected Kurths' *Halper*-based summary judgment motion because it agreed with Montana's opposition that "[a]ssuming the drug tax is subject to analysis under the *Halper* criteria, that case does not permit summary judgment based on the record now before the Court. [T]here is simply no record to apply the *Halper* criteria to this case." (App. to Pet. for Cert. at 56) At trial, however, Montana failed to introduce any evidence that the drug tax sought to be levied against the Kurths was reasonably related to the goal of compensating the government. The Bankruptcy Court said:

> This latter statement of D.O.R. is mere hyperbole, since the D.O.R. failed to introduce one scintilla of evidence as to the cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity. Moreover, deputy sheriff Saville was specifically asked by plaintiffs' counsel if the witness had made *any* (even a rough) estimate as to the cost to the state on prosecution of the Kurth criminal investigations, arrest, and conviction and he replied none was made. Consequently, the D.O.R. faced with the *Halper* issue, which was raised at the Motion for Summary Judgment stage, *put forth no effort* at the trial stage, *when it had an opportunity to do so*, to show the tax is "rationally related to the goal of making the government whole."

(App. to Pet. for Cert. at 55) (emphasis added)

can simply take judicial notice of the cost of drug abuse on society.

The governments' argument is inconsistent with the "intrinsically personal" protection of the Double Jeopardy Clause. *Halper*, 490 U.S. at 447. Under *Halper* the focus of the inquiry is whether "the sanction *as applied in the individual case*, serves the goals of punishment." *Halper*, 490 U.S. at 448 (emphasis added). No doubt the cost to society of Medicare and Medicaid fraud (the reason for the Federal Civil False Claims Act at issue in *Halper*) is high:

> The costs which fraud has placed upon our nation's Medicare and Medicaid programs have been severe. *[E]ach fraudulent claim filed exacts an immense toll from society.*

Mayers v. United States Dep't of Health & Human Servs., 806 F.2d 995, 999 (11th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987) (emphasis added). Notwithstanding the "immense toll" fraudulent health care claims exact from society, this Court in *Halper* limited the government's recovery to its "actual costs arising from Halper's fraud. . . . " 490 U.S. at 452. Halper was not required to shoulder the entire cost of health care fraud in this country, which, as the Eleventh Circuit noted is immense.

This Court in *Austin* rejected an identical argument advanced by the United States. There the government argued that forfeiture is not punitive, in part, because "[t]he forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from

the drug trade." 113 S.Ct. at 2811. Applying the *Halper* standard, the Court rejected this argument because forfeiture does not *solely* serve a remedial purpose. *Id.* at 2812. The Court, as in *Halper*, focused on the Government's *"actual costs,"* not the societal cost of drug abuse, when it made a comparative analysis of forfeitures in the context of the Excessive Fines Clause of the Constitution. *See Austin*, 113 S.Ct. at 2812 n.14 (emphasis added).

In sum, the bankruptcy court carefully followed the double jeopardy principles announced by this Court in *Halper*. On the basis of the evidence before it, the court properly found that Montana's tax simply punished the Kurths a second time for unlawful possession of marijuana. *Halper*, 490 U.S. at 450 ("We must leave to the trial court the discretion to determine on the basis of [the Government's] accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment").

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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INCOME AND MISCELLANEOUS TAX
Sub-Chapter 1
Dangerous Drug Tax Act

42.34.101 DEFINITIONS As used in this rule, unless context requires otherwise, the following definitions apply:

(1) "Criminal justice agency" as defined in 44-5-103, MCA.

(2) "Market value", is the value of the substance at the time of confiscation or report and may vary substantially throughout the state contingent upon consumer demand.

(3) "Public criminal justice information" as defined in 44-5-103, MCA. (History: Sec. 15-25-113 MCA; *IMP*, Sec. 15-25-111 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.102 FILING OF RETURNS - DANGEROUS DRUG INFORMATION REPORT (1) Every person possessing or storing dangerous drugs, and not authorized to do so by law, shall file a return with the department. This return shall contain the type, quantity, and market value of such dangerous drugs in their possession or being stored by them. This return shall be filed within 72 hours of their arrest.

(2) The department shall review such return and notify the taxpayer of the tax assessment within 30 days.

(3) At the time of arrest law enforcement personnel shall complete the dangerous drug information report as required by the department and afford the taxpayer an

opportunity to sign it. Should the taxpayer refuse to sign the form, the refusal shall be noted on the form, and the law enforcement officer shall certify and submit the form to the department within 72 hours of the arrest.

(4) A copy of the completed form may be retained in the file of the criminal justice agency for proof of compliance, and a copy shall be provided to the taxpayer.

(5) The form and content of the dangerous drug information report shall include: taxpayer name, address, social security number, arrest or booking number and the type and quantity of the dangerous drugs possessed or stored. (History: Sec. 15-25-113 MCA; *IMP*, Sec. 15-25-111 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.103 NOTICE OF ASSESSMENT - HEARING - LIEN (1) A notice of assessment is immediately due and payable.

(2) The taxpayer has the right to request a hearing on the matter of the tax. Such request must be submitted in writing within 30 days from the date of the assessment and shall specify the specific issues being contested. The hearing if requested, shall be conducted in accordance with the provisions and requirements of section 15-1-705, MCA. In most cases, one hearing will be held to consider both the assessment and the warrant of distraint.

(3) The associated criminal nature of assessments under this act is considered to be cause for emergency issuance of the warrant for distraint under the provisions of 15-1-703(1)(a), MCA. (History: Sec. 15-25-111 MCA; *IMP*, Sec. 15-25-113 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.104 CREDITS AND REFUNDS - PROCEDURES (1) If the department discovers that the amount of the tax collected is in excess of the amount due or that any portion of the penalty or interest was erroneously or illegally collected or upon claim duly filed by the taxpayer or upon final judgment of a court, the amount of any overpayment shall be credited against any other tax, penalty or interest due the department from the taxpayer and the balance of any excess shall be refunded to such taxpayer.

(2) Within 6 months after a claim is filed, the department shall examine a claim for refund and if such claim is approved shall issue a credit or refund to the taxpayer within 60 days of the approval; if the claim is disallowed, the department shall notify the taxpayer and grant a hearing thereon upon proper application from the taxpayer.

(3) Except as herein provided, interest shall be allowed on overpayments at the same rate as charged on delinquent taxes from either the due date of the tax or the date of the overpayment (whichever is later) to the date of the department approval of the refund or credit of the overpayment, unless:

(a) the overpayment is refunded within 6 months of the date due, or

(b) the overpayment or refund is less than $1.

(4) An overpayment not made incident to a bona-fide and orderly discharge of an actual tax liability or one reasonably assumed to be imposed by this rule shall not be considered subject to interest refund. (History: Sec.

15-25-113 MCA; *IMP,* Secs. 15-1-503 and 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.105 ASSESSMENT NOT CONTINGENT UPON CONVICTION (1) A criminal conviction for drug related charges or other charges is not a prerequisite for the tax. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.106 RESIDENCY NOT CONSIDERED FACTOR (1) Any person possessing or storing dangerous drugs within or transporting them through the jurisdictional boundaries of Montana is subject to the provisions of this act, whether resident or nonresident. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-111 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.107 CONFIDENTIALITY OF TAX RECORDS (1) The department will restrict the release of any information required to administer this act when the law requires confidentiality by the originating criminal justice agency. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.108 INVESTIGATION (1) The department may examine or inspect the public criminal justice information files of any criminal justice agency, or taxpayer records to administer this tax. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.109 ASSISTANCE OF COURTS - COUNTY ATTORNEY (1) Upon their concurrence the department may seek the assistance of any court of competent

jurisdiction, officer of the court or county attorney in collection of any assessment under the provisions of this act by:

(a) requesting a report for each taxpayer or person subject to drug related charges within the court's jurisdiction, which shall include the amount of any fines assessed, paid, waived or abated and the terms stipulated for payment of such fines. Such report may be submitted to the department monthly.

(b) requesting notification from the court of the conviction or sentencing of an individual subject to an assessment under the provisions of this act.

(c) requesting that upon notification of any assessment the court add the assessment to the amount of fines or forfeitures levied against the taxpayer and collected in like manner as such fines and forfeitures.

(d) requesting that upon notification of any assessment from the department the county attorney include payment of such assessment as an integral and contingent portion of any plea bargain agreement with the taxpayer. (History: Sec. 15-25-113 MCA; *IMP,* Sec. 15-25-113 MCA; *NEW,* 1987 MAR p. 2093, Eff. 11/13/87.)

42.34.110 CLOSING AGREEMENTS (1) The director of revenue or any person authorized in writing by him may enter into an agreement with any person relating to the liability of such person in respect to the tax imposed by this act for any taxable period. Any such agreement shall constitute the department's final and conclusive determination of the tax due under the Dangerous Drug Tax Act. (History: Sec. 15-25-113 MCA; *IMP,*

Sec. 15-25-113 MCA; *NEW*, 1987 MAR p. 2093, Eff. 11/13/87.)